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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF PORT TOWNSEND, WASHINGTON,

Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,

Defendant in Error.

Reply Brief of Plaintiff in Error

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Attorneys for Plaintiff in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

GREENWOOD, PRINTER, PORT TOWNSEND, WASH.

In the United States Circuit Court of Appeals,
For the Ninth Circuit.

THE CITY OF PORT TOWNSEND, WASHINGTON,

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REPLY BRIEF OF PLAINTIFF IN ERROR.

There are certain matters in the brief of defendant in error that require a specific reply in order to enable the court to arrive at the facts as shown by the record and the law applicable thereto.

THE FINDINGS DO NOT SUPPORT THE JUDGMENT.

One of our assignments of error is that the findings do not support the judgment. The law of this case as established on a former writ of error is that the plaintiff below must allege and prove facts which in a court of the state would entitle him to a mandamus. According to the same rule the findings in order to support the judgment must likewise show such facts.

Counsel for defendant in error seems to find fault with the decision in the case of *State ex rel American Freehold-Land-Mortgage Company vs Mutty*, 39 Wash. 624, and says that such decision is "based on the very narrow ground of a debatable discretion to levy a six-mill tax, and on the rather violent presumption that a levy of one mill on $930,946 valuation sufficed with some old taxes that had run over eight years to keep up with a warrant indebtedness of $125,000." (Brief, p. 26.)

Counsel wholly mistakes the position of plaintiff in error in this case and of the Supreme court of the state in the Mutty case supra. It was not necessary to make any presumption in favor of the defendant in the Mutty case to defeat the plaintiff in that case, nor was it necessary to make any presumption in favor of the defendant (plaintiff in error) in this case, to defeat the plaintiff's case as made by the original complaint.

In a case of this kind it is necessary for a plaintiff to show certain facts in order to succeed. If such facts are not shown no case is made, and the action fails. In other words, the court will make no presumption in favor of the plaintiff in order to assist his cause of action. The plaintiff succeeds or fails on the facts as shown by himself, and not on the weakness or strength of the defendant. Moreover, the court has already fully approved and followed the Mutty case.

Counsel devotes pages 28–32 of his brief in calculating the indebtedness of the city payable out of the Indebt-

edness fund on February 1, 1898, and comparing it with the total resources of said fund. So far as the indebtedness is concerned, he does not attempt to make an accurate calculation of the interest paid on the warrants. The total resources of the Indebtedness Fund are figured at $64,728.59, on the supposition that all taxes levied were collected. The total indebtedness of the city payable out of the Indebtedness fund is figured at $40,738.57. This amount of indebtedness is stipulated in paragraph XXV. of the Stipulation of Facts, record p. 160. The additional indebtedness stipulated in paragraph XXVI. of such stipulation on the same page of the record is wholly overlooked. This additional indebtedness as stipulated is the sum of $53,300 less the sum of $29,100, or the sum of $24,200. Adding this sum to the other indebtedness makes the total indebtedness to be paid out of the Indebtedness Fund the sum of $64,938.57, more than the total resources of the fund as calculated by counsel, without even taking into consideration the interest on the warrants comprising the $40,738.57 of the above indebtedness.

The fact of the matter is that these facts so stipulated are too indefinite upon which to base any judgment for plaintiff, although they might be used to show that the Indebtedness fund is exhausted and that a levy is necessary. This, however, would not affect the question whether the findings support the judgment. If the evidence justifies other findings not made by the court below, this court will take the proper method to supply such deficiency.

IN REGARD TO THE TRANSFERS OF MONEY FROM THE INDEBTEDNESS FUND.

It is stipulated in paragraph XVII of the Stipulation of Facts, record, p. 156, that there have been transferred from the Indebtedness Fund the following sums: On October 4, 1898, $510; on May 18, 1909, $2,500; on February 15, 1910, $787.41; making a total of $3,797.41. In paragraph XIII of said stipulation, record, p. 153, it is stipulated that the Intermela judgment, based on Warrant No. 2 of this series drawn on the Indebtedness fund, was paid after this suit was commenced and amounted to $3,467.63.

By reference to the Intermela case it will be seen that that case was an action against the treasurer for not paying Warrant No. 2, when said treasurer had sufficient funds to pay the same, and by inference it is readily seen that such action was successful because of the said transfers, and the failure to pay such warrant. This shows that the City has already paid the amount of the Intermela judgment or the sum of $3,467.41, because of such transfers made and the refusal to pay the said warrant. It would then be unjust to make the city pay on account of such transfers for anything except the difference between such transfers and the amount of the Intermela judgment or the sum of $329.78.

In speaking of these transfers, counsel on page 34 of his brief uses the following language. "It is a dishonest

trick and sham to let the money go into the proper fund and then by a bookkeeping transfer use it for a foreign purpose."

This charge of dishonesty is wholly unfounded. At the time the last of these transfers was made, the city council had good reason to believe and no doubt did believe that all of these Indebtedness Fund warrants were illegal. Up to that time, one case had been brought on warrants of this series, the case of State ex rel. American Freehold-Land Mortgage Co. vs Mutty, 39 Wash. 624, which afterwards appeared again in 45 Wash. 348, with the same plaintiff, but with Tanner instead of Mutty defendant, the councilmen meanwhile having changed. This case was decided in favor of the city and the warrants involved in that suit were declared illegal. The moneys were transferred from this fund for the simple reason that it was considered that they were not needed in said fund, and they used it for other legitimate purposes, as they had a right to do, if their belief that these Indebtedness Fund warrants were void, was correct. In fact, with the condition of affairs then existing, it was their duty to do just what they did. Yet counsel charges these people with dishonesty, and at the same time attributes nothing but upright motives to the councilmen who in the brief space of a day attempted to put the city in debt to the extent of nearly the whole constitutional debt limits on claims on which the Supreme court said the city was not liable. Counsel might justly be charged with not being a very good judge of upright conduct.

The transfer of $510 made on October 4, 1898, was made as stipulated to the Sinking fund for the purpose of taking up bonds. Such transfers are frequently made in the financial transactions of the city for the purpose of taking up the desired number of bonds and stopping interest on them, and then afterwards replacing such transfer after the further collection of taxes for the borrowing fund. It would appear that this particular amount was not replaced, may be because the city council had placed in this Indebtedness fund according to Sec. 9 of Ordinance No. 722, which said section is set out in full on p. 161 of the record, moneys that were not required to be placed there by law.

AS TO THE AMOUNT AND FORM OF THE JUDGMENT.

Counsel for defendant in error fails to understand the position of plaintiff in error with reference to the amount and form of the judgment. We do not for a moment contend that the court should have granted a writ of mandamus compelling the city council to make a levy, but we do contend that the court should in the first place have limited the payment of such judgment out of the Indebtedness fund of said city, and in the second place, that the amount of the judgment should have been different.

Section 966 of the Revised Statutes, U. S., provides for interest on judgments as follows:

"Interest shall be allowed on all judgments in civil causes, recovered in a Circuit or District court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the state in which such court is held, interest may be levied under process of execution; and it shall be calculated from the date of judgment, at such rate as is allowed by law on judgments recovered in the courts of such state."

The law of the state providing for interest on judgments reads as follows:

"Judgments hereafter rendered founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in said contracts; not in any case, however, to exceed ten per cent per annum: Provided, That said interest rate is set forth in the judgment; and all other judgments shall bear interest at the rate of six per cent per annum from date of entry thereof."

We might have set out these laws in our original brief, but we took it for granted that there would be no dispute about the fact that this judgment, as it stands, bears interest, on the full amount from date until paid.

Our contention is that the judgment should read as follows, omitting formal parts: "That the plaintiff do have and recover of and from the defendant the sum of $6,072.80 together with interest thereon from February

18, 1898, and the further sum of $7,880.00 together with interest thereon from February 19, 1898, etc."

Under such a judgment, if levies are made under the order of the court and the warrants in suit are paid in full, together with the costs of suit, the judgment will be satisfied. But if this judgment is allowed to stand, the warrants in suit may all be paid together with the costs of suit, and still this judgment will not be satisfied, because of the interest on interest included in it it will bear, amounting to about nine hundred dollars a year. This as we have shown in our former brief is contrary to the statute.

HAS THE FRAUD CHARGED IN THE ANSWER BEEN SUPPORTED BY PROPER EVIDENCE.

Counsel for defendant in error considers all charges of fraud absolutely without foundation, simply "fancies light as air." He urges the regularity of the proceedings by means of which the city became indebted to approximately the amount of its constitutional debt limit on claims on which it was not liable, the good faith of the counsel that brought about this indebtedness, and an absolute absence of any direct evidence of fraud. All of which makes the remark of Justice Bradley in the case of *Graffan vs Burgess*, 117 U. S., 180 [186], very appropriate. The question involved in this case was whether a certain sale was fraudulent. Justice Bradley in writing the opinion of the court uses the following language:

"It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed the greater the fraud intended, the more particular the parties to it often are to proceed according to the strictest forms of law."

There was no direct evidence of fraud in the case of *Kane vs. Independent School District*, 82 Iowa, 5, cited at top of page 59 of our first brief. The court in this case says:

"We have said that there was no direct evidence of collusion between the plaintiffs and directors; that is the evidence does not show that the plaintiffs and directors held a meeting and made a compact or agreement that the plaintiffs should commence an action upon the illegal claim and that the directors should make no appearance and thus enable plaintiffs to enforce a void obligation against the district. But fraud and collusion are not required to be shown by direct evidence but may be proved by facts and circumstances, *and in our opinion the evidence in this case shows that both of the parties to that action intended that the plaintiffs should recover judgment.*"

Notice the italicised words which we have thus emphasized. The fraud consisted in the fact that both of the parties intended that the plaintiffs should recover judgment.

When the city council that is responsible for this great burden had under consideration the payment of the claims of the warrant holders, they passed a resolution offering to pay, and in it they used the following language: "And whereas it is the opinion of said council that said claims are a just and legal obligation against the City of Port Townsend and should be satisfied and paid."

Take this very language together with the fact that the mayor and the whole council were unanimous, shows that like the case of *Kane vs Independent School District* both parties intended that the warrant holders should recover judgment, and therein lies the fraud against the taxpayer, Of course it may be argued that this language was used after judgment had been obtained. So it was. But would any lawyer or judge contend that these warrant holders could have gotten judgment against the city in case the city officers had been unwilling to have judgment go against the city. Instead of standing on their legal rights they took it upon themselves to determine whether the claims are just and legal.

There was no direct evidence of fraud in the case of *State ex rel Bradway vs De Mattos*, 88 Wash. 35, yet they declared the judgment involved in that case a constructive fraud against the taxpayers, the principals.

Justice Bradley in the case of *Graffan vs Burgess*, 117 U. S. 180 (186) supra, took it upon himself to read between the lines. This court in this case can do the

same thing, and they will find much food for serious thought.

Take one little item, for instance. The most natural thing in the world for any one to call the cessation of the meeting on the 15th of February, would be an adjournment. Opposing counsel calls the meeting of the 16th an adjourned meeting, as we pointed out in our brief, yet we find that in the minutes it was called a "recess." Evidently these proceedings were guided by one who knew the law, and tried to adjust the action of the council to legal forms.

The only thing that stands in the way of doing justice to the city are the street grade warrant judgments, and the most serious question in the whole case is whether the court can go behind these judgments.

Defendant city has alleged fraud in the taking of these judgments, whether actual or constructive makes no difference, and hence according to the decision in the case of *State ex rel Bradway vs De Mattos*, 88 Wash. 35, this allegation opens up the whole matter for consideration, and allows the court to base its decision on the cause of action upon which the street grade warrant judgments were founded.

Counsel seems to think that we have based our whole case upon consent judgments, and if it is shown that these were not consent judgments our whole case falls. While we are insisting that in fact these street grade warrant judgments were consent judgments, our

whole argument is by no means based on such contention alone.

One of our strongest grounds for going behind these judgments and setting them aside is the fact that they rest on no cause of action whatever, thus bringing them in this respect within the language of Chief Justice Fuller in the case of *Brownsville vs Loague*, 129 U. S. 493, and also within the principle of the case of *Granham vs Mayor of San Jose*, 24 Cal. 585, cited in our brief at p. 59.

In the case of *Bexby vs Adams*, 49 Iowa 507 (510), the court also went back of what was taken for the purpose of that case, a judgment of a court. The court uses this language:

> "But defendant's answer is in the nature of a cross petition and prays relief. It charges fraud in the procuring of the pre-emption certificate and assails it on that ground. Here is a direct attack upon the judgment of the county judge in a proceeding brought to establish its fraudulent character. It may thus be assailed for fraud."

The only fraud, however, that appeared to be in the case was that the judge granted the certificate without requiring proper evidence as to settlement and improvement.

Counsel insists in his brief, p. 65, that it is not necessary for plaintiff to go back of the judgments and depend upon the original cause of action for the enforce-

ment of the judgments. It is, however, necessary to bring this action to enforce those street grade warrant judgments, and if the court allows as a defense to such action an attack of fraud on such judgments, as is allowed in the state courts, then this court in this action can go into the merits of the former judgments before a judgment in this case will be rendered enforcing such former judgments.

This is the rule laid down in Adams Equity, 416; 2 Dan. Ch. Pr. 1614; *Lawrence vs Berney*, 2 Ch. Rep.

The case of *Stein vs Kaum*, 148 Ill. App. 519, is cited as a case showing how far a court of equity will go in order to avoid injustice.

If, however, the court should hold that these defenses cannot be made in this case because they are of equitable cognizance, then the court should make such a decision as will be without prejudice to the city in making these defenses in an equity case. Especially so because the record in this case shows that there is an ancillary equity case pending to preserve the fund out of which these warrants are to be paid if legal. See Opinion, record p. 204 et seq.

In this equity case the same defenses have been interposed to the validity of the warrants, and if for any reason these defenses are not admissible in this action at law, the court should make such a decision as will not debar the city from making them in the equity case, or even in a separate equity suit.

THE POWERS OF MUNICIPAL CORPORATIONS.

Since this case was briefed, another decision of the state court has been rendered touching the strictness with which the grant of power to municipalities is construed.

> *State ex rel. Port of Seattle v. Superior Court of King County*, 51 Wash. D. 165 [Advanced sheets.]

After stating that the doctrine of *ultra vires* is applied with greater strictness to municipal bodies than to private corporations, approvingly quote from a Minnesota case the following, which we consider very appropriate in view of the contest over the matter of the adjourned meeting. The quotation is as follows:

> "A different rule of law would in effect vastly enlarge the power of public agents to bind a municipality by contracts not only unauthorized but prohibited by law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent."

This was quoted after citing the same paragraph from Dillon that we cited in our first brief. If the statute points out ~~any~~ one way of exercising a power of a municip-

ality, it is not for any court to say that another way will do as well. This is a well known rule of municipal law.

20 Am. & Eng. Enc. 1142.
Dill. Mun. Corp., Sec. 239, 5th Ed.

THE GUARANTY OF THE CITY.

It is stipulated in Par. VI. of the Stip. of Facts, record, p. 140, that no contract, ordinance or resolution authorized the city to guaranty the payment of said warrants [street grade warrants]. In the absence of such contract, resolution and ordinance, such guaranty had no force whatever.

Dill. Mun. Corp., 814, 5th Ed.

Counsel mentions this guaranty, brief, p. 5, but does not argue that it has any force.

In conclusion, we desire to say that although the court finds that no particular one of the many defenses interposed to this action is in itself sufficient to defeat the action, yet the facts submitted in support of any and all of these defenses should be carefully considered together in support of the allegation of fraud contained in the answer whether such fraud is constructive or whether it is actual. One of them [defenses] may not be sufficient in itself, but all of them taken together, under all the circumstances of this case, certainly show constructive fraud against the taxpayers of the city.

ESTOPPEL.

After writing the reply brief up to this point, Addendum to the Brief of Defendant in Error was served, and the argument that the defendant city is estopped from urging that the warrants are illegal because ordered at an adjourned meeting, needs a reply.

The judgment creditors were before the city council by their attorneys. The attorneys were supposed to know the law and the powers of the city council. The business transacted resulted in a new contract and compromise. The judgment creditors did not insist on their judgments. The judgment creditors no doubt wrote out their own acceptance, and I am inclined to think that they also wrote the original proposition set forth at page 145 of the record. They, the members of the city council and the judgment creditors, made an agreement—a contract—at those adjourned meetings. The original payees certainly could not claim an estoppel against the city, and according to authorities cited under Argument 10 on p. 65, Brief of Plaintiff in Error, the defendant in error is in the same position as its original payees.

There is nothing in this that has the elements of an estoppel in pais. Estoppel in pais is based on misrepresentation, either by keeping silent or by actual misrepresentation.

11 Am. & Eng. Enc. 423.

Invalid contracts not induced by fraud or misrepre-

sentation cannot be made the basis of an estoppel in pais.

11 Am. & Eng. Enc. 423.

The conduct of all future city officers as shown by the record, could not be interpreted to induce any warrant holder to believe that the city would not urge the illegality of these warrants.

Respectfully submitted,

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